81-729

Office - Supreme Court, U.S.
FILED
OCT 16 1981
ALEXANDER L. STEVAS,
CLERK

No.:_____

IN THE

Supreme Court of the United States

October Term, 1981

BENJAMIN LADMER,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GERALD L. SHARGEL
Attorney for Petitioner
150 East 58th Street
New York, New York 10022
(212) 486-1717

Questions Presented

1. Whether the trial court's failure to deliver a clarified supplemental charge when the jury requested it rendered the jury's verdict ambiguous and possibiy not unanimous, thereby violating defendant's right to a fair trial?

2. Whether defendant's right to a fair trial was violated by the improper admission of testimony suggesting that defendant was connected to organized crime?

The Parties to the Proceeding

The original defendants in this case were Petitioner Ladmer, Anthony DiLapi, David Bergner, Steven Kingston, Robert Rao, Sidney Lieberman and Interstate Dress Carriers, Inc.

The charges against Mr. Lieberman were subsequently severed from the proceeding.

Messrs. Bergner, Kingston and Rao were acquitted, as was Interstate Dress Carriers, Inc.

Table of Contents

Questions Presented i

The Parties to the Proceeding i

Opinion Below 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Writ 4

1. The Court's Inadequate Supplemental Charge 4

2. Petitioner Joins in the Arguments Urged by Co-defendant Anthony DiLapi in His Petition to This Court 8

Conclusion 9

Appendix A -- Opinion of United States Court of Appeals 1a

Appendix B -- Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing In Banc 23a

Appendix C -- Constitutional and Statutory Provisions Involved in the Case 24a

Table of Authorities

Cases:

Apodaca v. Oregon,
406 U.S. 404 (1972) 7

Bollenbach v. United States,
326 U.S. 607 (1945) 6

Johnson v. Louisiana,
406 U.S. 356 (1972) 7

United States v. DiLapi,
651 F.2d 140 (2d Cir. 1981) 1

United States v. Gipson,
553 F.2d 453 (5th Cir. 1977) 7

United States v. Meadows,
598 F.2d 984 (5th Cir. 1979) 6

United States v. Natelli,
527 F.2d 311 (2d Cir. 1975) 7, 8

United States v. Walker,
557 F.2d 741 (10th Cir. 1977) 6

United States Constitution:

Sixth Amendment 6

United States Code:

18 U.S.C. § 2 2

18 U.S.C. § 1505 2

28 U.S.C. § 1254(1) 2

Other Authorities:

Federal Rules of Criminal Procedure
Rule 7(c)(1) 7

Rule 31(a) 6

No.:_____

IN THE

Supreme Court of the United States

October Term, 1981

BENJAMIN LADMER,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Benjamin Ladmer respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 9, 1981, affirming the conviction of Mr. Ladmer in the United States District Court for the Southern District of New York.

Opinion Below

The opinion of the Court of Appeals for the Second Circuit affirming Mr. Ladmer's conviction is reported at 651 F.2d 140 (2d Cir. 1981) and appears in the Appendix hereto at pp. 1a-22a.

Jurisdiction

The decision of the Court of Appeals for the Second Circuit was filed on June 9, 1981. Mr. Ladmer duly moved for reargument, and the motion was denied on August 19, 1981. This court has jurisdiction pursuant to 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

These are set forth in the Appendix at pp. 24a-26a.

Statement of the Case

Petitioner Benjamin Ladmer was convicted of Obstruction of Justice under 18 U.S.C. §§1505 and 2 (Count I of the indictment) and conspiracy to commit that offense (Count II). He was sentenced to five years imprisonment for each offense, with the sentences to run consecutively, amounting to a sentence of ten years imprisonment.

The charges against defendant were based upon the testimony of Matthew Eason, a trade-union officer with a record of drug possession and illegal possession of a pistol. In 1978, Eason learned that employees of two companies known as GS Supply and GS Temporary were not unionized. In April of that year, he sought to have his union represent these workers by filing a petition with the National Labor Relations Board calling for a representation election.

Shortly thereafter, Eason met with co-defendant Anthony DiLapi, who allegedly improperly attempted to induce him to withdraw his representation petition by offering bribes and making threats. Ladmer was seen by the Government as a participant in these transactions.

Defendant's role in the Government's charges was clearly peripheral. In 1977, Eason had met Ladmer in connection with organizing petition which Eason had

initiated and which he withdrew when he learned that Ladmer's union already represented the employees at that firm. Based upon this past above-board relationship, Ladmer was asked to act as an intermediary between DiLapi and Eason. Ladmer agreed to this request and introduced the two men. He did not, however, participate in the alleged initial bribe attempt by DiLapi.

The only substantive evidence against defendant was Eason's claim that, after meeting with DiLapi, Ladmer offered Eason $300, suggesting that the money was payment for the way Eason had cooperated in their 1977 dealings. Additionally, Ladmer was said to have arranged and attended an April 24, 1981 recorded meeting between Eason, DiLapi and another co-defendant, Rao, where Eason attempted to extract a large sum of money for his cooperation in the representation dispute.

In contrast to Eason's testimony, Ladmer offered an entirely different view of the proceedings. He explained that Eason had halted his organization efforts in 1977 because Ladmer's union was already certified as the bargaining agent for the employees involved. Further, Ladmer denied that he at anytime offered Eason $300 with respect to that matter or in any other connection. As for his role as an intermediary between DiLapi and Eason, Ladmer explained that he arranged the meeting only at the request of his superior in the union, Robert Rao. In regard to the April 24th meeting, Ladmer testified that he had participated in the hopes of resolving what he viewed to be a dispute over how much Eason should be legitimately reimbursed for expenses incurred in his attempted organization drives at GS Supply and GS Temporary.

Reasons for Granting the Writ

1. The Court's Inadequate Supplemental Charge

In the course of lengthy deliberations, the jury sent numerous requests to the court. One of these asked for a legal dictionary or, in the alternative, the court's help in defining "threat," "conspiracy," "reasonable doubt," "common sense" and "obstruction of justice." Later the jury informed the court that it had reached a unanimous verdict on seven counts but was "hopelessly deadlocked" on "the remaining five counts." In the light of the trial's outcome of acquittal for four co-defendants this must have meant that the jury was virtually settled on the acquittals but was unable to reach any agreement on Ladmer and DiLapi. The court then delivered an *Allen* charge.

After further intervening requests, the jury then sent a note to the court that read: "In count one of the indictment, is it necessary to find the defendant guilty of all acts in the indictment in order to find him guilty or can they be separated?" The court proposed to reply: "They can be separated." The defense objected, arguing that such a response could be construed to mean that the prosecution need not prove every element of the crime beyond a reasonable doubt. The Government responded that the note clearly referred to alternative means of committing the offense (viz. by threats or other corrupt means) and that it was clearly the law that proof of any of these means would suffice.

The court instructed the jury simply that "they can be separated." Juror No. 12 then spoke up, saying "Wait a minute. Can we have a clarification?" Adamantly the court responded: "No. They can be separated." The defense reiterated its objection and requested a supplemental charge to the effect that the jury must be unanimous as to "the act in question." The court refused to give this charge, although the defense pointed to the inherent ambiguity of the use of the pronoun "they" in the jury's request and the need to dispell any doubt on this point.

With commendable persistence the jury returned to the attack and sent out yet another note, asking:

> If a defendant is found innocent under two aspects in count one and guilty of the rest of the counts [sic] under count one can he be found guilty under count one?

This time the court announced that he would "reinstruct the jury on Title 18, Section 1505, the elements of the crime as to count 1, and Section 2 on aiding and abetting." The court then simply reread the portions of the original charge relating to these elements, but offered no fresh instructions and did not address at all the need for unanimity beyond a reasonable doubt on any one aspect or specification of the offense. The defense excepted.

The court's stubborn refusal to respond to the jury's earnest requests for illumination draped the verdict with ambiguity and makes it unsafe to allow the convictions to stand. The jury's notes were themselves cryptic, if not confused, and allow dangerous interpretations of the nature of the jury's puzzlement. The first note spoke of "all acts in the indictment," while the second note spoke of "two aspects" of count one (as to which other defendants had been found innocent) and then referred to the "rest." What the jury had in mind is quite unclear, but it is certainly within the bounds of reasonable possibility that the jury was not properly informed that they must be unanimous as to all the essential elements of the offense, including unanimity as to one of the alternative specifications of its commission. Faced with such evident danger of misapprehension of so fundamental a due process issue, the court was prejudicially supine in not positively instructing the jury in a supplementary manner. The rereading of the instruction from the original charge was of little value as it did not go directly to the possible vital misconception of the jury.

This Court stated in *Bollenbach v. United States*, 326 U.S. 607, 612 (1945):

> Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties the judge should clear them away with concrete accuracy.

This responsibility was not discharged in this case. As the Court of Appeals for the Fifth Circuit has observed in *United States v. Meadows*, 598 F.2d 984, 990 (5th Cir. 1979):

> It is well-established that in giving additional instructions to a jury, particularly in response to inquiries from the jury, a court must be especially careful not to give an unbalanced charge ... [T]he particular significance of a supplemental charge when a jury has been unable to reach a decision on the basis of all that it has heard up until that time demands an exacting sensitivity on the part of the trial court to give an accurate and balanced instruction.

The circumstances in the present case were exactly those contemplated in *Meadows* but the "exacting sensitivity" was not exhibited. The failure to emphasize the importance of unanimity as to every element of the crime omitted the very element that was indispensable to avoid the appearance of impropriety. The need for "concrete accuracy" (*Bollenbach, supra*) is "particularly important where as here the jury's communication is susceptible of differing interpretations." *United States v. Walker*, 557 F.2d 741, 746 (10th Cir. 1977).

Rule 31(a) of the Federal Rules of Criminal Procedure requires that a jury verdict in a federal criminal trial be unanimous. That rule gives explicit recognition to a requirement that this Court has long assumed to inhere in a federal criminal defendant's Sixth Amendment right to a trial by jury, a requirement reiterated

in the court's most recent pronouncements on this question in *Johnson v. Louisiana*, 406 U.S. 356 (1972) and *Apodaca v. Oregon*, 406 U.S. 404 (1972). Thus when a crime may be proved by a number of alternative specifications a conviction must be reversed when the court's charge leaves room for doubt as to whether the jury must be unanimous on any one of the alternative specified modes. *United States v. Gipson*, 553 F.2d 453, 456-457 (5th Cir. 1977).

In the Second Circuit, the leading case is the somewhat opaque decision in *United States v. Natelli*, 527 F.2d 311 (2d Cir. 1975). *Natelli* held that where a count includes alternative specifications (see Federal Rule of Criminal Procedure 7(c)(1)), it is not *per se* reversible error to fail to instruct the jury as to the need for unanimity on any one specification.

However, unlike the present case, *Natelli* was not one where the jury had displayed confusion in a query and even in *Natelli* the Court observed:

> When there is more than one specification as a predicate for guilt, each dependent on particular evidence which is unrelated to the other, it would be sound practice to instruct the jury that they must be unanimous on a particular specification to convict. 527 F.2d at 325.

An additional consideration calls compellingly for reversal of Ladmer's conviction. Since we cannot know which of the means alleged in the indictment the jury may have agreed on in order to convict Ladmer, it must be logically possible that they believed he had participated in or agreed to a scheme to threaten Eason. But there was no evidence at all of this. The evidence of threats (see *supra*) went only to other defendants on occasions when Ladmer was not present, to Bergner's meeting with Eason and to DiLapi's first meeting when Ladmer was out of the room. Thus the evidence as to this specification was strikingly insufficient.

Yet the jury's verdict may have been grounded on this element where the evidence was insufficient. As the court stated in *Natelli*:

> A difficulty does arise, however, if it is found as a matter of law that there should have been a directed verdict for a defendant on one of the specifications for insufficiency of evidence. The verdict then becomes ambiguous, for the jury could have rejected the specification which the appellate court holds sufficiently proved and have convicted only on the specification held to be insufficiently proved. In that event there seems to be no alternative to remand for a new trial. 527 F.2d at 325.

In *Natelli* this ambiguity was simply inferred by the Second Circuit from the inherent nature of the case. In the present case it is actually expressed in the jury's frank statements in the note transmitted to the court. In the absence of any sufficient evidence that Ladmer was in any way connected with threats, the verdict should stand.

2. Petitioner Joins in the Arguments Urged by Co-defendant Anthony DiLapi in His Petition to This Court.

Conclusion

For all of the above reasons, it is hereby respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

GERALD L. SHARGEL
Attorney for Petitioner
Benjamin Ladmer
150 East 58th Street
New York, New York 10022
(212) 486-1717

APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

ANTHONY DiLAPI and BENJAMIN LADMER
Defendants-Appellants.

Nos. 636-8, Docket 80-1337, 80-1373, 80-1375

Argued Feb. 4, 1981
Decided June 9, 1981

Ronald Meister, New York City (Daniel J. Kornstein and Kornstein, Meister & Veisz, New York City, on the Brief), for defendant-appellant Anthony DiLapi.

Gerald L. Shargel, New York City (Graham Hughes, New York City, on the Brief), for defendant-appellant Benjamin Ladmer.

James Harmon, Jr., Organized Crime Strike Force, Brooklyn, N.Y. (Edward R. Korman, U.S. Atty., Thomas P. Puccio and Douglas Eric Grover, Organized Crime Strike Force, Brooklyn, N.Y., on the Brief), for appellee.

Before FEINBERG, Chief Judge, NEWMAN, Circuit Judge, and MISHLER,* District Judge.

Following affirmance, 616 F.2d 613, of a district court order refusing to dismiss on double jeopardy grounds, defendants were convicted in the United States District Court for the Eastern District of New York, Henry

---

* The Honorable Jacob Mishler of the United States District Court for the Eastern District of New York, sitting by designation.

Bramwell, J., of obstruction of justice and conspiracy. Defendants appealed. The Court of Appeals, Newman, Circuit Judge, held that: (1) the issuance of a mandate from the Court of Appeals terminated that court's jurisdiction of the interlocutory appeal and the district court then had jurisdiction to move forward with the trial; (2) the record established that the jury was not confused as to the requirement of a unanimous verdict; (3) where the jury did not indicate any preference for recording a partial verdict, the district court's failure to instruct that it had the right to do so was not erroneous; (4) barring defendant from consulting with his counsel during a five-minute recess in the midst of the prosecutor's cross-examination of defendant was harmless error; (5) the giving of a prior similar act instruction was harmless error.

Affirmed.

Mishler, J. filed a concurring opinion.

NEWMAN, Circuit Judge:

Appellants Anthony DiLapi and Benjamin Ladmer were convicted by jury trial in the Eastern District of New York (Henry Bramwell, Judge) for obstruction of justice and conspiracy to commit that offense, 18 U.S.C. §§ 1505 and 371 (1976), in connection with filing of a representation petition with the National Labor Relations Board (NLRB). Appellants raise several challenges on appeal including claims that the verdict may not have been unanimous and that the Sixth Amendment was violated by an instruction to DiLapi not to consult with counsel during a trial recess in the course of his testimony. Concluding that none of the claims warrants reversal, we affirm the convictions.

I.

In 1978, Matthew Eason, a union organizer and president of Local 20408 of the United Warehouse Industrial and Affiliated Trades Employees Union, filed a representation petition with the NLRB for certification as the collective bargaining agent for the

employees of two employment agencies, GS Temporary Service, Inc. and GS Supply Associates, Inc. (hereafter collectively "GS"). GS provided employees for Interstate Dress Carriers, Inc. ("Interstate"). GS was apparently formed at Interstate's request after Interstate had entered into a collective bargaining agreement with the International Ladies Garment Workers Union (ILGWU) at the end of 1976. At that time, approximately three-quarters of Interstate's employees at its Jersey City facility were transferred to the payroll of GS. Since GS provided these employees to Interstate as "temporary help," they were no longer covered by the union contract with Interstate.

Soon after Eason filed his petition to have Local 20408 represent the GS employees, he received several telephone messages from appellant DiLapi, an organizer for Local 522 of the International Brotherhood of Teamsters. Eason eventually agreed to meet DiLapi to discuss the GS petition at Eason's office on April 12, 1978. The core of the trial concerned this and various other meetings between Eason and appellants at which appellants allegedly attempted to induce Eason to withdraw the petition by means of threats, bribes, and an offer of ILGWU membership for GS employees to be designated by Eason.

Just before the April 12 meeting, co-defendant David Bergner, an attorney whose office was on the same floor as Eason's office, approached Eason and told him that the persons Eason was about to meet were "nasty boys," affiliated with organized crime, who "would think nothing of handing [Eason his] head" if he did not cooperate. After Bergner left, DiLapi arrived with appellant Ladmer, co-defendant Stephen Kingston, president of DiLapi's Local, and a fourth, unidentified individual. Ladmer, an officer of the International Production, Service and Sales Employees Union, had met Eason in 1977 in connection with the withdrawal of a different NLRB petition involving the A.R. Winarick

Company. The president of Ladmer's union, co-defendant Robert Rau, had, at DiLapi's request, asked Ladmer to introduce DiLapi to Eason.

After the introductions, at DiLapi's request the others withdrew, and DiLapi then offered Eason $1,000 to withdraw the GS petition and threatened him with harm if he would not do so. Eason told DiLapi he would have to think about it, and the meeting ended. Ladmer returned and, outside of DiLapi's presence, offered Eason $300 as a payment for the way he had cooperated with Ladmer in their prior dealing involving the Winarick petition. After the meeting, Eason contacted various law enforcement and government agencies and was put in touch with the Federal Bureau of Investigation (FBI). Eason agreed to continue to meet with DiLapi and record all subsequent conversations. The tapes of those conversations were entered into evidence at the trial.

In the first taped conversation, a meeting on April 20 between Eason and DiLapi, DiLapi repeated an offer made earlier to admit 10 GS employees, designated by Eason, into Local 102 of the ILGWU, and mentioned that he did not want to "press" Eason. As no further meetings were planned, Eason spoke to an FBI agent and was advised to arrange another meeting. Eason then contacted Ladmer and asked Ladmer to serve as his "intermediary" in arranging another meeting with DiLapi. In that conversation, which Eason recorded, Ladmer agreed to set up a meeting for April 24 in Ladmer's office.

At the April 24 meeting, which was recorded, Eason, Ladmer, and DiLapi discussed how much money Eason would receive for withdrawing the petition. Eason was told not to mention any figures aloud but to write them down on a piece of paper, as DiLapi was apparently concerned that Ladmer's office might be bugged by the FBI. At one point Ladmer indicated on the paper that the amount would be $3,500. DiLapi stated that if Eason

did not cooperate, GS would simply go out of business and regroup under another name, and as a result, the current GS employees would not be rehired.

A few days later Interstate transferred its Jersey City employees to Manhattan, an action calculated to undermine Eason's organizing efforts because his petition only covered Jersey City workers. The following day, Eason met with Interstate's vice-president, Sidney Lieberman, and in a recorded conversation, Lieberman indicated his awareness of the prior approaches by DiLapi and increased the offer to $5,000. He then paid Eason $2,000 "front money" and agreed to place 10 men of Eason's choosing into ILGWU Local 102, in exchange for withdrawal of the petition. Interstate and Lieberman, along with ILGWU Local 102 and its manager, Sidney Gerstein, were also charged as co-defendants in this case.

All of the defendants testified at the trial, attempting to offer a theory to contradict the Government's contention that the defendants corruptly sought to induce the petition's withdrawal at the request of the employer Interstate. Defendants maintained that DiLapi's union, Local 522, wanted to organize the GS workers, and that they were merely offering to compensate Eason's union for actual expenses incurred in its organizing efforts if it withdrew in favor of Local 522.

The indictment alleged in the substantive count (Count One) that both appellants and others endeavored to influence, obstruct, and impede the administration of the law under which the GS representation proceeding was being conducted by the NLRB. Count One alleged that the obstruction of justice was accomplished by several acts—offering and paying Eason a sum of money, offering membership in Local 102 to persons designated by Eason, and threatening Eason with physical harm, economic injury, and the employees' loss of employment if he did not withdraw the GS

petition. The District Judge's instructions made clear that a request to withdraw a representation petition would be a crime only if it were made corruptly or by threats of force, and that the endeavor would be corrupt if, through payment of money to Eason or admission of persons into Local 102, the endeavor sought to prevent employees from organizing or to preserve a system of kickbacks. By their verdicts of guilty against appellants,[1] the jurors rejected the defense claim that reimbursement of expenses had been legitimately offered, and accepted the Government's contention that threats or corrupt means had been used in an attempt to force withdrawal of the GS petition.

II.

Trial Court Jurisdiction

Preliminarily, appellants contend that the District Court lacked jurisdiction to conduct the trial because, when the trial started, there was pending in this Court a petition seeking rehearing of an interlocutory appeal. Appellants had initially moved in the District Court to dismiss the indictment on grounds of double jeopardy. That motion was denied, and, upon an interlocutory appeal, *see Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, L.Ed.2d 651 (1977), this Court affirmed. *United States v. DiLapi*, 616 F.2d 613 (2d Cir. 1980). The opinion of affirmance was filed February 19, 1980, and contained a direction that the mandate issue "forthwith." The records of this Court reflect that the mandate in fact issued on February 21, 1980. Subsequently a timely petition for rehearing was filed pursuant to Fed.R.App.P. 40. Appellants moved in this Court to stay the trial, and this Court denied that motion

[1] Four defendants, Bergner, Kingston, Rau, and Interstate, were acquitted. Of the remaining three defendants, Lieberman was severed because of his illness mid-trial, and he is awaiting trial. ILGWU Local 102 pleaded *nolo contendere* to one count of impeding the performance of duties of the NLRB in violation of 29 U.S.C. § 162 (1976), and the charges against Gerstein were dismissed.

on April 18, 1980. Trial commenced April 21, 1980. The petition for rehearing was denied April 28, 1980.

The issuance of the mandate from this Court terminated this Court's jurisdiction. *Gradsky v. United States*, 376 F.2d 993 (5th Cir.), *cert. denied sub nom. Grene v. United States*, 389 U.S. 908, 88 S.Ct. 224, 19 L.Ed.2d 224, *vacated in part on other grounds sub nom. Roberts v. United States*, 389 U.S. 18, 88 S.Ct. 1, 19 L.Ed.2d 18 (1967); *United States v. Eisner*, 323 F.2d 38, 42 (6th Cir. 1963). The filing of a petition for rehearing did not revest jurisdiction in this Court, as appellants apparently recognized by moving to stay the trial. Had this Court been disposed to grant the petition it would have had to recall the mandate.[2] In the absence of a recall of the mandate or a stay of the trial, the District Court was entitled to exercise the jurisdiction it acquired upon the issuance of the mandate from this Court.[3]

---

[2] A motion to recall a mandate is not specifically provided for in the Federal Rules of Appellate Procedure, but was expected by the draftsmen to be available, *see* Advisory Committee Note to Fed. R. App. P. 37 (recall of mandate to make provision for interest), pursuant to Fed. R. App. P. 27. *See* 9 Moore's Federal Practice para. 241.02[4] (2d ed. 1980). Presumably, no reacquisition of appellate jurisdiction is needed to deny a petition for rehearing filed after issuance of a mandate. *Cf.* Fed R. Crim. P. 33 (when appeal is pending in the court of appeals, district court requires remand to grant a motion for new trial, but not to deny such motion).

[3] The record does not disclose when the mandate from this Court was filed in the District Court, and appellants make no complaint concerning the filing of the mandate in the District Court. We rely upon the issuance of the mandate from this Court as the event that returned jurisdiction to the District Court. However, prompt filing of the mandate in the District Court would be the better practice to provide an official notice in the records of that court. Such filing is the significant event for purposes other than reacquiring jurisdiction, *see, e.g.*, Fed. R. Crim. P. 35(b) (measuring the 120-day period for motion to reduce sentence from "receipt" of mandate).

Unanimity of the Jury Verdict

During its deliberations, the jury sent a series of notes to the Court, which led to the note that is the focus of appellants' claim that the verdict may not have been unanimous. The series began toward the end of the second day of deliberations with a jury note (Ex. 15) stating: "We have reached a verdict on four of the defendants. We are sharply and evenly split on the remaining two. We await further instructions from the Court." Defense counsel requested that the jury be asked to return the verdicts they had agreed upon. The District Court refused to ask the jury for a partial verdict and simply instructed the jury to continue deliberating "with a view to reaching a decision on the remaining defendants."

The next day, shortly after the jury resumed deliberating, it requested legal definitions of key terms in the charge, such as "threat," "conspiracy," and "reasonable doubt." It then sent a second note (Ex. 18) indicating its continued deadlock, stating: "We have reached a unanimous decision on seven counts, but remain hopelessly deadlocked on the remaining five counts."[4] The Court again rejected counsel's request to receive a partial verdict and gave the jury a balanced *Allen*[5] charge. Following a further request to hear some of the recordings, the jury sent the note that is the source of appellants' objection. In this note (Ex. 20), the jury asked: "In count one of the indictment, is it necessary to find the defendant guilty of all acts in the indictment to find him guilty, or can they be separated?"

After consulting with counsel, *see United States v. Ronder*, 639 F.2d 931 (2d Cir. 1981), the Court recalled

---

[4] The jury's reference to twelve counts presumably reflects its multiplication of the number of counts, 2, by the number of defendants, 6.

[5] *Allen v. United States*, 164 U.S. 492, 501-02, 17 S.Ct. 154, 157, 41 L.Ed. 528 (1896).

the jury and responded: "They can be separated." At that point, one juror asked for clarification. The Court responded: "No. They can be separated." Then, apparently preferring to have the request for clarification made precise in written form, the Court added: "Send another note out. They can be separated is the answer." After the jury retired, defense counsel requested that the jurors be specifically instructed that they must be unanimous as to each act they find to be proven. Counsel urged that ambiguity in the question warranted further instruction. The Court declined to charge specifically on unanimity as to acts, expressing the view that the original charge on unanimity sufficed and that the jury could send in another note if it had any further questions or need for clarification.

Within thirty minutes another note (Ex. 21) was received asking: "If a defendant is found innocent under two aspects in count one, and guilty on the rest of the counts [*sic*] under count one, can he be found guilty under count one?" Judge Bramwell read the note to counsel but declined to hear their suggested responses, contrary to the proper practice set forth in *United States v. Ronder, supra*, which was decided after this trial. Then, instead of responding specifically to the jury's inquiry, which is the preferable course, Judge Bramwell answered by rereading to the jury the portions of the original charge concerning the statute, the elements of the offense in Count One, and aiding and abetting. About ten minutes later, the jury requested to be discharged for the evening because it could not reach a decision that night. On the following day, the jury found appellants guilty on both counts.

Appellants contend that the sequence of notes reveals a distinct possibility that the jurors were uncertain as to the requirement of their unanimity and that the District Court's failure to reinstruct specifically on unanimity requires reversal. We disagree. The

original charge included the usual instruction on the requirement of a unanimous verdict, and nothing in the jurors' subsequent inquiries revealed any uncertainty *about this requirement*. Appellants suggest that the note asking "can they be separated?" (Ex. 20) may have sought to inquire whether conviction could result if some of the jurors found one or more alleged acts to have been established and the other jurors found other acts to have been established. We think that is a strained interpretation of the note. The question in the note asking "can they be separated?" was put as an alternative to the question "is it necessary to find the defendant guilty of all acts in the indictment ....?" The plain import of the note, read as a whole, is that the jurors wanted to know if their unanimous verdict must include a finding of guilty as to all acts charged in Count One, or only one or more of the separate acts charged. Nor is uncertainty as to unanimity reflected by the jurors' subsequent inquiry (Ex. 21) asking whether guilt on Count One can be found even if a defendant is innocent "under two aspects under count one." On the contrary, this inquiry simply reflects the jury's persistent effort to obtain clarification as to whether all alleged acts had to be proved, most likely to have the law convincingly explained to whichever jurors were not sufficiently enlightened by the Court's laconic response to Exhibit 20.[6]

---

[6] Appellants also suggest that by permitting conviction upon a finding that less than all of the alleged acts were committed, the District Court permitted the jury to convict even though the appellants may have been found innocent of endeavoring corruptly to influence, obstruct, and impede the proper administration of the representation proceeding. But the District Court's charge made clear that the corrupt endeavor was the gist of the offense, which had to be found beyond a reasonable doubt, and that the alleged acts were the means for accomplishing the endeavor. *Cf. United States v. Amrep*, 560 F.2d 539 (2d Cir. 1977), *cert denied*, 434 U.S. 1015, 98 S.Ct. 731, 54 L.Ed.2d 759 (1978).

The record in this case does not disclose ambiguity that would create doubt as to whether the verdicts were unanimous. This case is quite unlike *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), on which appellants rely, where the jurors were instructed that they need not all agree on which one of several specified acts the defendant had committed. In any event, in view of the substantial evidence of appellants' guilt, the failure to reinstruct the jury specifically as to unanimity on the substantive count was, at most, harmless error.[7]

However, we are somewhat troubled by one aspect of the events occurring during the sequence of jury notes—the District Court's response to counsel's suggestion that a partial verdict be received as to some of the defendants. In a multi-defendant trial, the jury is entitled to return a verdict "at any time in its deliberations" as to one or more defendants. Fed.R.Crim.P. 31(b). We have approved the receipt and publication of a jury's partial verdict as to less than all defendants and as to less than all counts. *United States v. Cotter*, 60 F.2d 689 (2d Cir.), *cert. denied*, 287 U.S. 666, 53 S.Ct. 291, 77 L.Ed. 575 (1932); *see United States v. Frankel*, 65 F.2d 285 (2d Cir.), *cert. denied*, 290 U.S. 682, 54 S.Ct. 119, 78 L.Ed. 588 (1933). Plainly Rule 31(b) would be violated if a trial judge were to tell a jury it may not return a partial verdict or were to refuse a jury's request to return a partial verdict. But that is not what occurred here. Though the jury reported that it had reached verdicts as to some of the defendants, it did not indicate any preference for reporting a partial verdict. The request for return of a partial verdict came from counsel, and it was that request that Judge Bramwell refused.

The difficulties of a jury's task in reaching unanimous verdicts as to several defendants tried on multiple

---

[7] In view of our disposition, we do not reach the Government's further contention that unanimity is not required as to specifications of the means by which the crime of obstruction of justice was committed.

charges counsel against judicial attempts to structure the course of jury deliberations. At the same time, the fundamental precept that guilt is individual must be observed in the deliberative process. For this reason, juries in multi-defendant trials are instructed, as this jury was, to give separate and individual consideration to the case against each defendant. *United States v. Calabro*, 449 F.2d 885, 893 (2d Cir. 1971), *cert. denied*, 405 U.S. 928, 92 S.Ct. 978, 30 L.Ed.2d 801 (1972); *United States v. Kelly*, 349 F.2d 720, 757 (2d Cir. 1965), *cert. denied*, 384 U.S. 947, 86 S.Ct. 1467, 16 L.Ed.2d 544 (1966); Devitt and Blackmar, *Federal Jury Practice and Instructions* § 11.09 (1977). Regard for these considerations suggests that juries should have considerable latitude in determining for themselves the structure of the deliberative process that will best assure individual consideration of each defendant. The jury's discretion should extend to the timing of reporting its verdicts. If jurors are prohibited from returning a partial verdict as to some defendants, they might mistakenly infer that the individual consideration they had already given to some of the defendants is expected to be reassessed in light of their subsequent deliberations. On the other hand, if they are required to return a partial verdict, there is a risk that some jurors might mistakenly permit a tentative vote to become an irrevocable final vote and forgo the opportunity to gain new insights concerning the evidence in one defendant's case from consideration of the same evidence as it bears upon other defendants.

We think that juries should be neither encouraged nor discouraged to return a partial verdict, but should understand their options, especially when they have reached a stage in their deliberations at which they may well wish to report a partial verdict as to some counts or some defendants. In this case, the jury reported that it had reached a decision as to four of the defendants, was divided on the remaining two defendants, and awaited further instructions. At that point, particularly

in view of counsel's request, an appropriate response from the trial judge should have included a neutral explanation of the jury's options either to report the verdicts reached, or to defer reporting of all verdicts until the conclusion of deliberations. Such an instruction should advise the jurors that any verdicts they choose to report will not be subject to later revision. However, the absence of such an explanation did not deny the appellants any protected right in a case such as this where the jury neither attempted to return a partial verdict nor even asked if it could do so. Moreover, the jury's ultimate decision to convict the two appellants and acquit four co-defendants adequately indicates that individual consideration was given to the case against each defendant. *Cf. United States v. Bubar*, 567 F.2d 192, 205 (2d Cir.), *cert. denied*, 434 U.S. 872, 98 S.Ct. 217, 54 L.Ed.2d 151 (1977).

Restriction on Consultation with Counsel

On the afternoon of the first of two days of appellant DiLapi's testimony, during cross-examination, the prosecutor sought a brief recess and requested that DiLapi "be instructed on cross-examination not to speak with his attorney." The Court instructed Di Lapi that he "not discuss the case until he comes back to the stand," which occurred approximately five minutes later. When counsel objected, the Court responded that it had previously given the "same instruction" to another witness at defense counsel's request, and that "fair is fair." This referred to an episode several days earlier, at the end of a trial day during the cross-examination of a key Government witness, Eason. Defense counsel had asked the Court whether the "usual rule" would prevail that the "witness while under examination should speak to no one." The Court thereupon instructed Eason not to discuss the case with anyone, including the prosecutor, and to "just come back to the stand."

DiLapi maintains that the instruction barring him from any discussion during the recess[8] violated his Sixth Amendment right to assistance of counsel. In *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976), the Supreme Court held unconstitutional an instruction that the defendant not consult with counsel during an overnight recess between the defendant's direct and cross-examination. However, the Court noted that it was not deciding the constitutionality of a prohibition on consultation imposed during a brief routine recess. 425 U.S. at 89 n.2, 96 S.Ct. at 1335 n.2. This Court had encountered that situation prior to *Geders* in *United States v. Leighton*, 386 F.2d 822 (2d Cir. 1967), *cert. denied*, 390 U.S. 1025, 88 S.Ct. 1412, 20 L.Ed.2d 282 (1968), in which the defendant was barred from consulting with his counsel during a lunch recess that occurred between the defendant's direct and cross-examination. We disapproved the prohibition in *Leighton*, terming it "plainly uncalled for," *id.* at 823, but declined to order a new trial in the absence of any "actual harm to the right to effective assistance of counsel," *ibid.* In *Geders* the Supreme Court reversed without pausing to inquire as to prejudice, apparently persuaded that foreclosing consultation with counsel inevitably impairs the effective assistance of counsel when the prohibition extends over as long a period as an overnight recess. DiLapi urges us to apply *Geders* to the five-minute recess that occurred here and reverse regardless of whether any identifiable harm resulted. He also contends that there was actual prejudice because

---

[8] The Court's reference to its earlier instruction to Eason arguably suggests that the Court intended to restrict DiLapi from consulting with his counsel beyond the five-minute recess. However, we think the record is clear that the instruction did not extend beyond the brief recess and that DiLapi did not think it did. The Government's request was made in the context of a specific brief recess, and the Court's instruction explicitly stated that the prohibition applied until DiLapi returned to the stand. Moreover, neither DiLapi nor his lawyer ever told the District Court they believed themselves barred from consulting beyond the five-minute recess, nor sought relief from any possibly broader prohibition.

he was prevented from discussing with his lawyer a significant event that had occurred earlier in the day, the severance granted to co-defendant Lieberman.

We reaffirm our view, expressed in *Leighton*, that it is error to bar a defendant from consulting with his counsel during any trial recess. The fact that other witnesses were cautioned not to speak to anyone during recesses does not justify a prohibition upon defendant-lawyer conversations. The defendant's Sixth Amendment rights were obviously in effect, and he may consult with his counsel during any recess so long as the orderly conduct of the trial is not impaired.[9]

Whether the error warrants reversal in light of *Geders* is a closer question. Some courts of appeals have applied *Geders* to reverse convictions, without inquiring as to actual harm, when communication between defendant and counsel was barred during brief recesses in the middle of the trial day. *United States v. Conway*, 632 F.2d 641 (5th Cir. 1980) (lunch recess during cross-examination of defendant); *United States v. Bryant*, 545 F.2d 1035 (6th Cir. 1976) (lunch recess during defendant's direct testimony); *see United States v. Allen*, 542 F.2d 630 (4th Cir. 1976), *cert. denied*, 430 U.S. 908, 97 S.Ct. 1179, 51 L.Ed.2d 584 (1977) (routine recess; *Geders* applied prospectively because counsel did not object to instruction); *United States v. Vesaas*, 586 F.2d 101, 102 n.2 (8th Cir. 1978) (grave doubts whether brief restrictions during trial recesses can be squared with *Geders*; conviction reversed on other grounds). There is some force to the contention that reversal should always occur because attempts to demonstrate how helpful a consultation would have been may themselves

[9] There is no claim here that counsel sought to prolong a recess inordinately for extended consultation. Nor do we face, or express any view on, the issue that would arise if a trial judge denied a request for a recess sought during examination of a defendant to enable him to consult with counsel.

risk some impairment of the right to effective assistance of counsel by intruding upon protected confidences. On the other hand, with the Supreme Court having explicitly limited its holding in *Geders* to an overnight recess and the disapproval expressed in our prior decision in *Leighton* having concerned a lunch recess, we are reluctant to say in the present state of the law that the erroneous instruction requires an automatic reversal in this case.

Assessing the significance of the error, we find not even a remote risk of actual prejudice. DiLapi identifies Lieberman's severance as the topic he was prevented from discussing because of the Court's instruction, yet there is not even a suggestion as to how such a conversation on that topic during the recess might have had any bearing on DiLapi's subsequent cross-examination. Even if there is a reluctance to offer such explanation, the fact remains that the severance had occurred earlier in the day, and DiLapi had some opportunity to consult about it while seated at counsel table and during the lunch recess. Moreover, though counsel objected to the instruction, he gave no indication to the District Court that there was some matter requiring consultation, nor did DiLapi request consultation. We note that when a later recess occurred during cross-examination of a co-defendant, the District Court acceded to that defendant's request to consult with his lawyer. In sum, we see no reason, in the circumstances of this case, for ordering a new trial because of the erroneous instruction. We need not determine whether a similar instruction would require reversal in cases arising hereafter without regard to actual prejudice. It is sufficient to state that the instruction should not again be given.

Prior Similar Act Instruction

The District Judge gave an instruction concerning prior similar acts, charging the jury, in

customary language, that while a prior similar act is not evidence of the commission of an act charged in the indictment, the jury could consider evidence of a prior similar act on the issue of intent, once they determined from other evidence that the act charged in the indictment was committed. In colloquy after the charge was given, the Government urged that this instruction was justified because of the $300 payment Ladmer had offered Eason for his cooperation in withdrawing the Winarick petition. Ladmer challenges the instruction, contending that there was no evidence to indicate that the offer of the $300 was illegal and hence it was not a prior act similar to the one charged in the indictment.

Since the offer of $300 was made long after withdrawal of the Winarick petition, it was not similar to the offers charged in the indictment, which were claimed to be corruptly made to induce withdrawal of a pending petition. Indeed, the Government's theory in summation was not that the $300 offer was a prior example of a payment to induce withdrawal of a petition, but rather a gratuity extended to "grease the skids" for receipt of the payments tendered in connection with the GS petition. Thus, the similar acts instruction should not have been given, *see United States v. Torrence*, 480 F.2d 564 (5th Cir. 1973), even though the evidence of the $300 offer was properly admitted as relevant to intent in connection with the GS petition. Nevertheless, the error was harmless. The instruction made no explicit reference to the $300 offer, and the prosecutor's summation, in referring to the offer, did not try to suggest that it was a prior example of wrongful conduct. There was no appreciable risk that the mere giving of the instruction, unrelated to any specific evidence, branded the appellants as persons involved in prior wrongdoing.

We have considered appellants' other contentions and find them to be without merit.

Affirmed.

MISHLER, District Judge, concurring:

I concur. However, my concurrence does not extend to the view expressed in the majority opinion on the Sixth Amendment violation claim.

Though DiLapi's Sixth Amendment rights were clearly in effect at the time of the five minute recess, I am unconvinced that his Sixth Amendment right to effective assistance of counsel precluded the trial judge from directing him not to discuss "the case" with anyone. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." I find that the majority's position—that the Sixth Amendment permits a defendant to "consult with his counsel *during any recess* so long as the orderly conduct of the trial is not impaired," *ante*, at 148 (emphasis added),— is too broad.

Under the circumstances of this case, DiLapi's Sixth Amendment right to counsel was not implicated by the trial court's prohibition. The right to assistance of counsel during defendant's cross-examination while the court is in session is limited to the defense counsel's right, and obligation, to make objection to inappropriate questions and other irregularities which appear during cross-examination.[1] The Sixth Amendment right does not encompass the right to consult counsel during cross-examination. Rather the defendant must rely on, and is amply protected by, the obligation of the court to conduct a fair trial, and its further obligation to preserve the integrity of the judicial process. Accordingly, I find that DiLapi's right to consult with counsel

---

[1] As the majority points out, *United States v. Leighton*, 386 F.2d 822 (2d Cir. 1967), *cert denied*, 390 U.S. 1025, 88 S.Ct. 1412, 20 L.Ed. 2d 282 (1968), concerned a prohibition against attorney-client communications during a recess that occurred between the defendant's direct and cross-examination. For the reasons set out in my concurrence, I would qualify the majority's interpretation of *Leighton* in accordance with the view herein set forth.

rested exclusively on his right to a fair trial which is guaranteed by the due process clause of the Fifth Amendment.

In reaching this conclusion, I am guided by *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976), as well as an historical interpretation of the Sixth Amendment guarantee of the right to counsel. In *Geders*, the prohibition against consulting with counsel was with respect to an overnight recess. The objection leveled against that direction at trial was based on the belief that defendant's attorney "had a right to confer with his client about matters other than the imminent cross-examination ...." *Geders v. United States*, 425 U.S. at 82, 96 S.Ct. at 1332. The Court did not hold that the Sixth Amendment necessarily afforded defendant the right to discuss his cross-examination with counsel during a trial recess. Rather, the Court determined that because of the variety of important matters relating to all aspects of the trial which are routinely discussed during overnight recesses, the trial judge's attempt to secure "truth and fairness" in the trial process by prohibiting attorney-client consultations when there had been a perceived "risk of improper 'coaching' " must give way to the defendant's Sixth Amendment right to counsel. *Id.* at 97-91, 96 S.Ct. at 1335-37. In suggesting one method for coping with "the problem of possible improper influence on testimony," the Court alluded to the scope of the right to assistance of counsel during brief trial recesses as follows:

> "[T]he trial judge, if he doubts that defense counsel will observe the ethical limits on guiding witnesses, may direct that the examination of the witness continue without interruption until completed. If the judge considers the risk high he may arrange the sequence of testimony so that direct and cross-examination of a witness will be completed without interruption.
>
> * * * * * *

> Inconvenience to the parties, witnesses, counsel, and court personnel may occasionally result ... if a court continues in session several hours beyond the normal adjournment hour .... [However], convenience occasionally must yield to concern for the integrity of the trial itself." 425 U.S. at 90-91, 96 S.Ct. at 1336 (footnote omitted).

The trial judge's power to continue trial without recess for the purpose of preventing an attorney's improper coaching will not accommodate a construction of the Sixth Amendment which guarantees the defendant a right to consult counsel during cross-examination.

The scope of the Sixth Amendment right to counsel has evolved over the years based on the Court's perception of counsel's importance in "guiding" the defendant through the trial process. *See e.g., Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932) (a layman requires the "guiding hand of counsel at every step in the proceedings against him" because of his lack of "skill and knowledge" in the law); *United States v. Wade*, 388 U.S. 218, 225, 87 S.Ct. 1926, 1931, 18 L.Ed.2d 1149 (1967) (the right to assistance of counsel at pretrial confrontations arises "whenever necessary to assure a meaningful 'defence' "); *United States v. Ash*, 413 U.S. 300, 308-09, 93 S.Ct. 2568, 2573, 37 L.Ed.2d 619 (1973) (the right derives in part from the "desire to minimize the imbalance in the adversary system"). However, conceding the fact that consultation with counsel by a defendant who is undergoing cross-examination is desirable, and may even be necessary for the purpose of rendering credible testimony, we must also account for the function of cross-examination in the trial process in construing the Sixth Amendment guarantee of counsel.

The age-old tool for ferreting out truth in the trial process is the right to cross-examination. "For two centuries past, the policy of the Anglo-American system

of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law." 5 Wigmore, Evidence § 1367 (Chadbourn rev. 1974). The importance of cross-examination to the English judicial system, and its continuing importance since the inception of our judicial system in testing the facts offered by the defendant on direct, *see* U.S.Const. Amend. VI (confrontation clause); *Pointer v. Texas*, 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965); *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965), suggests that the right to assistance of counsel did not include the right to have counsel's advice on cross-examination.

The Court has consistently acknowledged the vital role of cross-examination in the search for truth. It has recognized that the defendant's decision to take the stand, and to testify on his own behalf, places into question his credibility as a witness and that the prosecution has the *right* to test his credibility on cross-examination. *See e.g., United States v. Havens*, 446 U.S. 620, 626-67, 100 S.Ct. 1912, 1916-17, 74 L.Ed.2d 559 (government must be permitted "proper and effective cross-examination ...."), *reh. denied*, 446 U.S. 620, 101 S.Ct. 25, 65 L.Ed.2d 1172 (1980); *Brown v. United States*, 356 U.S. 148, 154-55, 78 S.Ct. 622, 626, 2 L.Ed.2d 822, *reh. denied*, 356 U.S. 948, 78 S.Ct. 776, 2 L.Ed.2d 822 (1958). Once the defendant places himself at the very heart of the trial process, it only comports with basic fairness that the story presented on direct is measured for its accuracy and completeness by uninfluenced testimony on cross-examination. *Cf. Brown v. United States*, 356 U.S. at 154-55, 78 S.Ct. at 626, *quoting, Fitzpatrick v. United States*, 178 U.S. 304, 315, 20 S.Ct. 944, 949, 44 L.Ed. 1078 (1900) ("[W]e know of no reason why an accused person who takes the stand as a witness should not be subject to cross-examination as other witnesses.").

The assistance which accrues to the defendant by virtue of counsel's presence in the courtroom during defendant's cross-examination needs no discussion here. Surely such assistance is consistent with the plain meaning of that term as it is used in the Sixth Amendment right to counsel clause—i.e., "the right of the accused to have counsel acting as his assistant," *United States v. Ash*, 413 U.S. at 312, 93 S.Ct. at 2575,—and, I believe, in the context of the question before us, it adequately "assure[s] fairness in the adversary criminal process." *United States v. Morrison*, ____ U.S. ____, ____, 101 S.Ct. 665, 667, 66 L.Ed.2d 564 (1981). Accordingly, in light of the relevant history, I conclude that counsel's presence in the courtroom during defendant's cross-examination fully satisfies the Sixth Amendment mandate for the limited purpose indicated.

Having grounded DiLapi's right to confer with counsel while undergoing cross-examination on the Fifth Amendment due process clause, only a showing of a clear abuse of the trial judge's discretion would provide a basis for reversal. *See Geders v. United States*, 425 U.S. at 86-87, 96 S.Ct. at 1334-35. The trial judge, not having abused his discretion, did not violate defendant's right to due process. Accordingly, I find no error in the trial judge's instruction.

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of August, One thousand nine hundred and eighty-one.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY DiLAPI and BENJAMIN LADMER,
Defendants-Appellants.

No. 80-1337, 80-1373, 80-1375

A joint petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, Anthony DiLapi and Benjamin Ladmer,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ _____
A. DANIEL FUSARO
Clerk

Appendix C
Constitutional and Statutory Provisions Involved in the Case

CONSTITUTION OF THE UNITED STATES

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Appendix C
Constitutional and Statutory Provisions Involved in the Case

STATUTORY PROVISIONS

18 U.S.C. § 1505. Obstruction of proceedings before departments, agencies, and committees

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by

either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Office - Supreme Court, U.S.
FILED
JAN 22 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-729 and 81-730

In the Supreme Court of the United States

OCTOBER TERM, 1981

BENJAMIN LADMER, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY DiLAPI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

MARSHALL TAMOR GOLDING
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether, given a refusal by the General Counsel of the National Labor Relations Board to produce privileged materials pursuant to a defense subpoena before testing his duty to produce the materials by appealing from a contempt order, and given the resulting dismissal of the unsworn jury and delay of trial pending final determination of that appeal, petitioners were entitled to dismissal of the indictment (a) on the basis of the principle enunciated in *Jencks* v. *United States*, 353 U.S. 657 (1957); (b) on grounds of double jeopardy; or (c) on grounds of denial of a speedy trial.

2. Whether the right to counsel was violated by trial court rulings (a) restricting the use of the materials produced by the General Counsel, and (b) forbidding petitioner DiLapi to confer with counsel during a five-minute recess in his cross-examination.

3. Whether petitioner DiLapi was properly sentenced.

4. Whether the trial court's supplemental instructions permitted the jury to return a verdict that was not unanimous (No. 81-729 only).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	9
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Arizona v. *Washington*, 434 U.S. 497	12
Coppolino v. *Helpern*, 266 F. Supp. 930	16
Crist v. *Bretz*, 437 U.S. 28, aff'g 546 F.2d 1336	11, 12
Gardner v. *Florida*, 430 U.S. 349	19-20
Geders v. *United States*, 425 U.S. 80	17, 18
Gregory v. *United States*, 369 F.2d 185, cert. denied after remand, 396 U.S. 865	16
International Business Machines Corp. v. *Edelstein*, 526 F.2d 37	16
Jencks v. *United States*, 353 U.S. 657	10, 11
S&E Contractors, Inc. v. *United States*, 406 U.S. 1	10-11
Serfass v. *United States*, 420 U.S. 377	11
Specht v. *Patterson*, 386 U.S. 605	20
United States v. *Allen*, 542 F.2d 630, cert. denied, 430 U.S. 908	18
United States v. *Bass*, 535 F.2d 110	19
United States v. *Bryant*, 545 F.2d 1035	18
United States v. *Conway*, 632 F.2d 641	18
United States v. *Dansker*, 537 F.2d 40, cert. denied, 429 U.S. 1083	10
United States v. *Farries*, 459 F.2d 1057, cert. denied, 410 U.S. 912	15
United States v. *Martin Linen Supply Co.*, 430 U.S. 564	11
United States v. *Trevino*, 556 F.2d 1265	10
United States v. *Vesaas*, 586 F.2d 101	18

Cases—Continued Page

United States v. *Weston*, 448 F.2d 626, cert. denied, 404 U.S. 1061 19
Williams v. *New York*, 337 U.S. 241 ..... 19, 20

Constitution and statutes:

United States Constitution:

Fifth Amendment, Double Jeopardy Clause.... 9
Sixth Amendment 17

Speedy Trial Act, 18 U.S.C. 3161(h)(8)(A)..... 13
18 U.S.C. 371 2
18 U.S.C. 1505 2

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-729

BENJAMIN LADMER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-730

ANTHONY DILAPI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming petitioners' convictions (Pet. App. 1a-22a)[1] is reported at 651 F.2d 140. The opinion of the court of appeals

[1] "Pet. App." references are to the appendices to the petition in No. 81-730.

affirming on interlocutory appeal the denial of petitioners' motion to dismiss the indictment on grounds of double jeopardy (Pet. App. 46a-49a) is reported at 616 F.2d 613. The opinion of the court of appeals affirming in part, vacating in part, and remanding the order of the district court holding the General Counsel of the National Labor Relations Board in criminal and civil contempt for refusing to produce documents subpoenaed by petitioners (Pet. App. 24a-45a) is reported at 600 F.2d 1027, cert. denied, 444 U.S. 866.

The order of the court of appeals granting in part petitioners' petition for a writ of mandamus (Pet. App. 50a-51a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1981. A petition for rehearing was denied on August 19, 1981 (Pet. App. 23a). The petitions for a writ of certiorari were filed on October 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of obstructing a National Labor Relations Board proceeding, in violation of 18 U.S.C. 1505, and of conspiring to do so, in violation of 18 U.S.C. 371. Each was sentenced to consecutive terms of five years' imprisonment on each count. The court of appeals affirmed (Pet. App. 1a-22a).

1. The evidence showed an attempt by petitioners and others[2] to induce Matthew Eason, president of Local 20408 of the United Warehouse Industrial and Affiliated Trades Employees Union, to withdraw a representation petition that he had filed with the NLRB; the inducement consisted of both threatening Eason and the employees whom he represented and offering Eason a monetary bribe to withdraw the petition (Pet. App. 2a-5a).

The employees in question had formerly worked for Interstate Dress Carriers, Inc., which had entered into a collective bargaining agreement with Local 102 of the International Ladies Garment Workers Union (*id.* at 3a). Interstate caused the formation of two purportedly independent employment agencies—GS Supply Associates, Inc., and GS Temporary Service, Inc.—and transferred three-quarters of the employees at its Jersey City, New Jersey facility to the payroll of the latter corporations (*ibid.*). Whereas the transferred workers previously had been covered by the collective bargaining agreement and were entitled to union wages and benefits, they were subsequently provided to Interstate by GS as "temporary help" not covered by the agreement (*ibid.*). Learning of this situation, Eason obtained the necessary number of authorization cards from GS employees showing their interest in having Local

[2] Petitioners were indicted together with Robert Rao, Sidney Lieberman, Stephen Kingston, David Bergner, Sidney Gerstein, Interstate Dress Carriers, Inc., and Local 102, International Ladies Garment Workers Union (Pet. App. 3a-5a). Lieberman was severed from the case in the middle of trial for health reasons; Rao, Kingston, Bergner and Interstate were acquitted; Local 102 pleaded nolo contendere to one count; and the charges against Gerstein were dismissed (*id.* at 6a n.1).

20408 represent them, and filed a petition with the NLRB seeking to have the local certified as collective bargaining agent (*id.* at 2a-3a).

Shortly after the petition was filed, Eason was contacted by petitioner DiLapi, an organizer for Local 522 of the International Brotherhood of Teamsters; DiLapi made an appointment to meet Eason on April 12, 1978, at Eason's office to discuss the petition for certification (Pet. App. 3a). Before DiLapi arrived, acquitted co-defendant David Bergner came to Eason's office and told him that he was about to meet "nasty boys" with organized crime connections who would think nothing of doing harm if he failed to cooperate (*ibid.*; Tr. 110-113).[3] DiLapi subsequently arrived, accompanied by petitioner Ladmer (secretary-treasurer of the International Production, Sales and Service Employees Union), the president of DiLapi's local, and an unidentified individual (Pet. App. 3a). After introductions, all but DiLapi left, and DiLapi offered Eason $1,000 in exchange for withdrawal of the petition and threatened him with harm if he refused (*id.* at 4a). Petitioner Ladmer then returned to the room and, out of DiLapi's presence, offered Eason $300 purportedly for Eason's cooperation in withdrawing an earlier petition for certification involving another company (*ibid.*). Eason contacted the FBI following this meeting and agreed

[3] "Tr." refers to the trial transcript. "Tr." followed by a date refers to transcripts of pretrial proceedings. "A." refers to the appendix filed in the court of appeals in Nos. 80-1013 to 80-1018, the interlocutory appeal by petitioners, Rao, Lieberman, Kingston, Bergner and Interstate from the district court order denying their motion to dismiss the indictment on double jeopardy grounds (see Pet. App. 46a-49a). The "Tr." references are based on record references in the government's briefs in the court of appeals.

to record all subsequent conversations with petitioners (*ibid.*).[4]

At a subsequent meeting between Eason and petitioners at Ladmer's office, both the inducements to withdraw the petition and the threats regarding failure to withdraw it were repeated (Pet. App. 4a-5a). DiLapi indicated concern during this meeting that the office might contain FBI recording devices, and Eason was instructed not to mention monetary amounts but merely to write them on pieces of paper (*id.* at 4a-5a). Ladmer communicated on paper that the offer to Eason was $3,500 (*id.* at 4a).

In a meeting a few days later between Eason and co-defendant Sidney Lieberman, Interstate's vice-president, Lieberman increased the bribe to $5,000 and offered to place 10 employees of Eason's choosing in ILGWU Local 102. Lieberman paid part of the bribe —$2,000 in "front money"—at this meeting (Pet. App. 5a).

2. The indictment was returned on September 6, 1978 (Pet. App. 26a). Thereafter Local 102 and Interstate sought, in the representation proceedings before the NLRB, to obtain the signed union authorization cards submitted by Eason to show the interest of the GS employees in being represented by Local 20408 (*ibid.*). These requests were denied by the NLRB hearing officer on November 13, 1978, on the ground that the cards were privileged.[5] On Decem-

---

[4] Also, on April 14, 1978, Eason filed an amended petition with the NLRB adding Interstate (including its employees who were members of Local 102) as a company which he sought to organize (Pet. App. 4a, 26a; Tr. 151-155).

[5] Defendants' attempts to secure the cards from the Justice Department Organized Crime Strike Force prosecutors in the criminal proceeding were unsuccessful because the prose-

ber 29, 1978, Interstate served subpoenas on NLRB personnel directing them to produce, at the criminal trial then scheduled to commence on January 3, 1979, "all 'authorization cards or applications for membership in Local 20408' and 'other writings' concerning a 'showing of interest' by employees in Local 20408" (*id.* at 26a-27a).

Various grounds respecting the materiality of the cards were suggested; principally it was contended that defendants needed to see the cards to determine whether they were forged and, if forgery were revealed, to use the evidence to attack Eason's credibility (see DiLapi Pet. 5-6). The NLRB and the Strike Force prosecutors moved, on January 3, 1979, to quash the subpoenas on grounds of privilege (Pet. App. 27a). The district court called for the filing of legal memoranda and oral argument on the motions, but permitted jury selection to go forward (*id.* at 47a). The jury was selected on January 4 and 5, but it was not sworn and it heard no opening statements or testimony (*ibid.*).

3. On January 8, 1979, the court denied the motion to quash and directed the NLRB to turn over the cards to the defendants (Pet. App. 27a). The NLRB immediately filed an appeal and an application for mandamus with the court of appeals; both were dismissed on January 9 (*id.* at 27a). On January 11, 1979, the NLRB General Counsel formally declined to produce the authorization cards, citing the NLRB's policy of keeping confidential the identity of employees who sign union authorization cards in or-

---

cutors possessed neither the cards nor copies of them (Tr. 1/10/79 at 108, 113). It was determined in December 1978 that Eason possessed copies, a fact communicated to the defense (A. 100).

der to protect them from possible threats of reprisal from employers or rival unions (see Pet. App. 36a-37a nn.5-7, 42a n.10).

The contempt adjudication enabled the NLRB to test the propriety of the district court's disclosure order, and the NLRB General Counsel promptly appealed to the court of appeals (Pet. App. 42a n.10). In the meantime, petitioners and the other defendants argued that the district court should swear in the jury and then dismiss the indictment (A. 397). The district court declined to swear in the jury, and discharged it, noting problems raised by newspaper publicity in the case and the requests of some jurors to be excused because of employment and family obligations (Pet. App. 47a-48a; A. 463-464).

On the NLRB General Counsel's appeal from the contempt adjudications, the court of appeals (1) affirmed with modification the district court's order denying the motions to quash, (2) affirmed the civil contempt order "insofar as it relate[d] to the * * * disclosure order as modified," and (3) vacated the criminal contempt order (Pet. App. 39a-42a). Specifically, the court of appeals held that the defense was entitled to examine the authorization cards to determine if they were forged, since such evidence might provide the basis for an entrapment defense or be used to impeach Eason's credibility (*id.* at 35a), but it acknowledged that there was an "important and valid public interest," both generally and on the facts of this case, in maintaining the confidentiality of the cards (*id.* at 37a, 39a),[6] and it accordingly modified the disclosure order to provide

[6] The court noted the filing of a sealed affidavit from one of the Strike Force prosecutors that substantiated threats of violence "in the instant case" (Pet. App. 37a n.7).

that the cards should be disclosed to defense counsel "but * * * not * * * to the defendants themselves" (*id.* at 39a). Thereafter, on May 8, 1979, the cards were produced to the defendants' counsel (A. 191).[7]

4. In a letter to the district court dated May 31, 1979, Interstate announced its intention to move to dismiss the indictment on double jeopardy grounds (A. 192-193). When no such motion was filed forthwith, the court, on June 11, 1979, directed that the defendants file and serve any motion and supporting memoranda on the double jeopardy issue by July 9, 1979 (A. 473-474). By letter to the court dated June 18, 1979, Interstate contended that the court lacked jurisdiction to proceed with the case and that a double jeopardy motion would thus be premature because the court of appeals' mandate in the appeal by the NLRB General Counsel from the contempt order had not been issued.[8] In response, the court on June 21, 1979, vacated its order setting a date for filing a double jeopardy motion. On August 31, 1979, the court of appeals, acting on the government's motion, issued its mandate in the contempt case. On September 12, 1979, the government requested, without avail, that the defendants be required—in order to avoid further delays of trial—to make any double

---

[7] The defendants never introduced the cards into evidence during the trial nor used them as a basis for cross-examining Eason; and petitioners do not contend that any of the evidence they submitted was developed from the cards.

[8] On May 31, 1979, the defendants moved the court of appeals to stay its mandate to allow them time to petition for certiorari, and on June 12, 1979, the mandate was stayed. That petition (*DiLapi* v. *Irving*, No. 79-51), asserting that the court of appeals exceeded its authority by modifying the district court's disclosure order, was filed on July 11, 1979, and denied on October 1, 1979 (444 U.S. 866).

jeopardy motion promptly (A. 477-478). On October 30, 1979, the court set November 13, 1979, as the trial date (A. 484), and only after this scheduling order did the defendants file their double jeopardy motion. The motion was denied on January 7, 1980 (A. 511-513), and on February 19, 1980, the court of appeals affirmed (Pet. App. 46a-49a). A motion to dismiss the indictment on speedy trial grounds—filed by petitioner Ladmer and three other defendants, but not joined by petitioner DiLapi—was denied on April 14, 1980, on a finding that the reason for the delay was "the time consuming resolution of the numerous pre-trial motions * * * litigated by the defendants in regard to the various procedural [requests] made by the defendants" (Tr. 4/14/80 at 13-13A). Trial commenced on April 22, 1980.

ARGUMENT

1. Petitioner DiLapi makes three arguments based upon the initial refusal by the NLRB General Counsel to comply with the subpoenas and the proceedings that resulted from that refusal. First, he contends (Pet. 17-18) that, instead of holding the General Counsel in contempt for the initial refusal to produce the cards, the trial court should have dismissed the indictment. Second, he argues (Pet. 19-22) that his trial before the second jury, after the first unsworn jury had been dismissed to allow time for an appeal from the contempt order, violated his rights under the Double Jeopardy Clause. Finally, he contends (Pet. 22-25) that he was deprived of his right to a speedy trial by the delay attendant upon the appeal from the contempt order. None of these contentions has merit.[9]

---

[9] DiLapi, who did not join the motion to dismiss on speedy trial grounds, failed to preserve the issue and is thus pre-

a. The argument that the General Counsel's initial refusal to produce the authorization cards required immediate dismissal of the criminal indictment under *Jencks* v. *United States*, 353 U.S. 657 (1957), is based on several erroneous premises. First, it assumes that the withholding by the NLRB is attributable to the Strike Force prosecutors because all are part of the federal government. But materials do not come within the *Jencks* rule unless they are within the possession of the prosecutorial arm of the government. *United States* v. *Dansker*, 537 F.2d 40, 61 (3d Cir. 1976), cert. denied, 429 U.S. 1083 (1977); *United States* v. *Trevino*, 556 F.2d 1265, 1271 (5th Cir. 1977). As the court of appeals correctly held in the appeal from the contempt adjudications (Pet. App. 31a), "the General Counsel has no control over a criminal prosecution brought by the Justice Department," and the NLRB "is not subject to direct control by the Executive Branch, but rather is an independent regulatory agency created by statute * * *." [10] *Jencks* is also inapposite because it con-

---

cluded from raising it here. However, Ladmer, who did join in the motion and therefore preserved the issue for himself, joins in all the arguments urged in the DiLapi petition (see Ladmer Pet. 8).

[10] *S&E Contractors, Inc.* v. *United States*, 406 U.S. 1, 10 (1972), on which petitioner DiLapi relies (Pet. 25) for the proposition that "the government [must be treated] as a unit," in fact indicates why it is inappropriate to equate the NLRB's efforts to protect the confidentiality of authorization cards with withholding of material by the prosecutors in this case. In *S&E Contractors* the Court held that the Department of Justice was not empowered to seek judicial review of an administrative decision by the Atomic Energy Commission regarding a contract dispute between an AEC contracting officer and a contracting firm. The AEC was "the United States" for the purpose of such disputes, the Court concluded,

cerns "statements or reports * * * of government witnesses" (353 U.S. at 672); whatever the merits of petitioners' unsubstantiated allegations of forgery, the cards could not be considered "statements" of government witness Eason. Finally, the remedy for a violation of the *Jencks* principle is not dismissal of criminal charges, but a new trial at which the materials are provided to the defense. Here, of course, petitioners had access to the materials prior to trial.

b. The simple answer to DiLapi's double jeopardy contention is that, in the case of a jury trial, jeopardy does not attach until the jury is empaneled and sworn. *Crist* v. *Bretz*, 437 U.S. 28, 35 (1978); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977); *Serfass* v. *United States*, 420 U.S. 377, 388 (1975).[11] DiLapi argues that, because *Crist* v. *Bretz*, *supra*, refers to a defendant's "valued right" to continue with the chosen jury, it supports the proposition that jeopardy attaches before the empaneled jury is sworn. But the Court in *Crist* stated that its prior decisions had "necessarily pinpointed the stage in a jury trial when jeopardy attaches" (437 U.S. at 35), and that, while "it might then be

---

and its decisions were not reviewable by other departments (406 U.S. at 10-12). By the same token, here the Strike Force had no control over the NLRB's determination to invoke a claim of privilege.

[11] As the court of appeals noted (Pet. App. 49a), jeopardy may attach where the trial begins without the jury's having been sworn and the oath then becomes a mere formality. But this is not such a case; and indeed, petitioners and their co-defendants indicated their awareness of the significance of swearing in the jury since, as noted above, they responded to the NLRB's initial refusal to disclose the authorization cards by asking the district court to swear in the jury before discharging it (see page 7, *supra*).

concluded that the point of the attachment of jeopardy could be moved a few steps forward or backward without constitutional significance" (*id.* at 37), the rule establishing that point is "a settled part of federal constitutional law" which " 'serves as the linchpin for all double jeopardy jurisprudence' " (*id.* at 38, quoting 546 F.2d at 1343). However broad a reading might be given to some of the language of *Crist* (see 437 U.S. at 38-39, Blackmun, J., concurring), the case clearly does not require reversal of the decision below.

In any event, even if jeopardy could be said to have attached before the jury was sworn, there was "manifest necessity" for its dismissal. See *Arizona* v. *Washington*, 434 U.S. 497, 505 (1978). While the defendants objected to dismissing the unsworn jury, they did not support the prosecution request that the trial proceed on a delayed basis. Faced with a refusal by most of the defendants either to go to trial immediately or to agree to a delayed trial before the empaneled jury, the trial court acted reasonably in dismissing the jury.[12]

c. The speedy trial claim is totally baseless. Although the defendants knew from the beginning that the NLRB both possessed the cards and regarded them as privileged, and were also informed that Eason had copies of the cards, they persisted in attempting to obtain the cards from the prosecutor through discovery, never attempted to subpoena the copies of the cards from Eason, and did not direct a subpoena to the NLRB until the eve of trial, despite the certainty that the NLRB's claim of privilege

---

[12] DiLapi's contention (Pet. 21 n.12) that the dismissal of the jury was necessitated by "the Government's intentional misconduct" is, as we show (pages 10-11, *supra*, and page 13, *infra*) without foundation.

would necessitate a delay while the claim was tested.[13] As we have shown, the "contempt" in the failure to produce the cards was that of an official of an independent agency and not that of the "the Government" as DiLapi contends (Pet. 22). Moreover, contrary to DiLapi's suggestion (*ibid.*), the action of the NLRB General Counsel in initially refusing to produce the cards was not willful disobedience of a court order but rather a reasonable means for testing the propriety of the district court's unconditional disclosure order. As the court of appeals concluded (Pet. App. 39a-40a, 42a n.10), the order was improperly broad, and in refusing to disclose the cards to the defendants under the terms of that order, the General Counsel chose the only "feasible alternative" to accepting a serious violation of the Board's legitimate confidentiality policy. Thus, the four-month period during which the propriety of the disclosure order was litigated in the court of appeals was excludable under the Speedy Trial Act, 18 U.S.C. 3161(h)(8)(A), as a continuance granted in the interest of justice, as the district court found (Tr. 4/16/79 at 24-26; order of Bramwell, J., May 1, 1979). The remaining delay before trial actually commenced was occasioned entirely by the defendants' procedural maneuvers. They moved the court

[13] The inference is compelling that production of the cards was sought solely as a tactical ploy to provide a basis for a motion to dismiss. The defendants made no trial use of the cards once they obtained them. Although, in seeking production, they claimed that the signatures on the cards could well have been forged (see page 6, *supra*), they never had the cards examined for forgery by handwriting experts (Tr. 10/30/79 at 6), even though Interstate's corporate records include handwriting exemplars of the signatures of its employees (Tr. 1/8/79 at 36).

of appeals to stay its mandate while they petitioned for certiorari, took the full 90 days allowed to them to file their petition, waited until a new trial date was set (one month after their petition for certiorari was denied) before they filed their double jeopardy motion, consumed further time with what was (as we have shown) essentially a frivolous appeal from denial of that motion, and consumed still further time with their speedy trial motion. In sum, the entire delay of trial is attributable, directly or indirectly, to the defendants, reflecting a calculated pattern of disruptive and delaying tactics. It would be an affront to justice to reward this conduct with dismissal of the charges against petitioners.

2. DiLapi also contends (Pet. 11-17) that his right to counsel was violated by trial court rulings restricting the use that could be made of the authorization cards after they were produced, and by a court order that he not confer with his counsel during a five-minute recess called in the middle of his cross-examination. Neither claim has merit.

a. In its ruling on the NLRB General Counsel's appeal from the contempt order, the court of appeals modified the trial court's disclosure order by providing (Pet. App. 39a-40a) that the cards were not to be disclosed to the defendants themselves, that they were to be produced in bulk rather than individually so as to ensure that knowledge of the identities of the employees who had executed the cards would be confined to counsel, and that counsel could interview those who had executed the cards only outside the presence of the defendants and in the presence of the court or a magistrate. Subsequently, the court of appeals granted the defendants' petition for a writ of mandamus to the limited extent of allowing counsel to conduct interviews outside the presence of the court and at any location where the card signers

were found, on the condition, *inter alia*, that the identities of those interviewed and the substance of what they said not be revealed to the defendants (Pet. App. 50a-51a).[14] Contrary to DiLapi's assertion, the trial court did not impose additional restrictions inconsistent with the orders of the court of appeals. Counsel were not forbidden, as DiLapi claims (Pet. 15), to discuss the cards with their clients; they were free to discuss the use of the cards in preparation of the defense and forbidden only to reveal to their clients the names of those who had executed the cards (Tr. 5/7/79 at 16-18). Nor were counsel limited, as DiLapi further claims (Pet. 7-8, 15), to written contact with the card signers advising the latter of their right not to respond and requiring them to telephone counsel for an appointment. Counsel were permitted to make personal contact, but chose to proceed by mail (Tr. 4/14/80 at 36-45). The only restriction on the mail contact was that the card signers be advised of their right to be

---

[14] These limitations were reasonable, given the real potential for retaliation against the card signers if their identities became known to the defendants themselves (see page 7 & note 6, *supra*). A defendant's right to counsel does not include an automatic right to participate in the interviewing of potential defense witnesses. Compare *United States* v. *Farries*, 459 F.2d 1057, 1062 (3d Cir. 1972), cert. denied, 410 U.S. 912 (1973). Petitioner DiLapi does not show how either he or petitioner Ladmer—who presumably were strangers to the card signers, since they were officials of unions having no contact with Interstate's employees—could have aided in the process of developing defense evidence by being present at the interviews or otherwise learning the identity of those interviewed.

interrogated in a noncoercive manner (order of Bramwell, J., Nov. 15, 1979).[15]

b. The prosecutor obtained a five-minute recess during his afternoon cross-examination of petitioner DiLapi and "requested that DiLapi 'be instructed on cross-examination not to speak with his attorney' " (Pet. App. 13a). Having given a similar instruction at DiLapi's request respecting government witness Eason, the court "instructed DiLapi * * * not [to] discuss the case until he comes back to the stand" (*ibid.*).[16] The court of appeals held (*id.* at 15a-16a) that it was error to bar a defendant from consulting with his counsel during any trial recess, but that, since there was "not even a remote risk of actual prejudice," reversal was not required.

There is no reason to afford further review of the limited question presented—whether a momentary interference with a defendant's access to his counsel is a sufficient deprivation of the right to counsel to require reversal. For, contrary to petitioner DiLapi

---

[15] The three cases cited by DiLapi on this issue (Pet. 16)—*International Business Machines Corp.* v. *Edelstein*, 526 F.2d 37, 41-44 (2d Cir. 1975); *Gregory* v. *United States*, 369 F.2d 185, 188 (D.C. Cir. 1966), cert. denied after remand, 396 U.S. 865 (1969); and *Coppolino* v. *Helpern*, 266 F. Supp. 930, 935-936 (S.D.N.Y. 1967)—are totally inapposite, since they involved restrictions on defense interviews with government witnesses. The card signers were not government witnesses, but merely potential defense witnesses on a collateral issue.

[16] Because cross-examination was completed and redirect commenced on that day, both the prosecutor's and the court's precise language disposes of DiLapi's claim (Pet. 12 n.8) that the instruction carried over to the overnight recess. Significantly, DiLapi does not assert that, in fact, he and his counsel refrained from consulting during the overnight recess.

(Pet. 12-13), the decision below does not conflict with decisions of other circuits applying the rule of *Geders* v. *United States*, 425 U.S. 80 (1976).

In *Geders* the defendant and his counsel were forbidden to confer during a 17-hour overnight recess. The potential for actual prejudice when communication is cut off for so long a period is self-evident. As the Court explained (425 U.S. at 88):

> It is common practice during such recesses for an accused and counsel to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance.

Clearly a five-minute recess cannot possibly be a time "of intensive work, with tactical decisions to be made and strategies to be reviewed" or even a time in which to discuss the significance of the day's events. Thus the Court, which carefully noted (*id.* at 91) that it did not "deal with" any "limitations imposed in other circumstances" and did not have before it "a brief routine recess during the trial day" (*id.* at 89 n.2), in no way precluded a holding that a prohibition on communication covering a five-minute recess during cross-examination would not violate the Sixth Amendment, much less require reversal.

Indeed, as Judge Mishler noted in his concurrence (Pet. App. 19a-20a), by suggesting that a trial judge could order a cross-examination to continue without recess in order to prevent improper coaching of a witness (425 U.S. at 90-91), the Court in *Geders* plainly assumed that a defendant has no Sixth Amendment guarantee that he will enjoy the advice of counsel to guide his testimony during cross-examination. The enjoyment of such a right surely should not turn on the fortuity of a prosecution request for a brief recess during cross-examination.

The post-*Geders* cases on which DiLapi relies are all distinguishable. In *United States* v. *Conway*, 632 F.2d 641, 643 (5th Cir. 1980), and *United States* v. *Bryant*, 545 F.2d 1035 (6th Cir. 1976), the restrictions were during the luncheon recess. *Bryant* specifically noted that "an hour-long luncheon recess" is a time "when a party on trial would ordinarily be entitled to consult with his attorney." 545 F.2d at 1036. The court in *United States* v. *Vesaas*, 586 F.2d 101, 102 n.2 (8th Cir. 1978)—which reversed the conviction on grounds of defects in the indictment and insufficient evidence—merely expressed "grave doubts" that even a brief restriction on consultation (the duration of which was not indicated in the record) could be squared with the Sixth Amendment. Finally, in *United States* v. *Allen*, 542 F.2d 630 (4th Cir. 1976), cert. denied, 430 U.S. 908 (1977)—where the restriction applied to two recesses, one lasting 20 minutes (allowing considerably more time for real consultation than the five-minute recess here) and the other apparently about "a minute" (see 542 F.2d at 632)—the Fourth Circuit applied its reversible error holding prospectively only (*id.* at 634). That, in effect, is what the court of appeals did in this case (see Pet. App. 16a).

3. DiLapi contends (Pet. 25-30) that his due process rights were violated when the court, at sentencing, heard uncorroborated hearsay evidence concerning his alleged connection with organized crime figures. The simple answer is that, although DiLapi was the principal actor in the conspiracy to threaten and bribe Eason into withdrawing the petition for certification, he received the same sentence as Ladmer, as to whom no evidence concerning an organized crime connection was offered at sentencing. It is readily apparent, therefore, that the court imposed sentence on both petitioners on the basis of the gravity of the offense, as shown by the trial evidence, without regard to any organized crime connections. Thus, *United States* v. *Weston*, 448 F.2d 626 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972), upon which DiLapi relies (Pet. 29), is inapposite, since there the court expressly relied in pronouncing sentence on the hearsay evidence in the presentence report. Before receiving the report, compiled at the government's request, the court had indicated an intention to impose a minimum sentence (see 448 F.2d at 628).[17]

In any event, the Constitution does not restrict sentencing judges to considering only trial-competent evidence received in open court. *Williams* v. *New York*, 337 U.S. 241, 251 (1949). Contrary to DiLapi's assertion (Pet. 27-28), neither *Gardner* v. *Florida*,

---

[17] *United States* v. *Bass*, 535 F.2d 110 (D.C. Cir. 1976), upon which DiLapi also relies (Pet. 29), while viewing the *Weston* holding favorably (see 535 F.2d at 120), affirmed a sentence influenced by uncorroborated hearsay evidence because the hearsay report was disclosed to the defendant and he did not dispute its truthfulness. *Id.* at 121. Here, the hearsay evidence was presented in open court.

430 U.S. 349 (1977), nor *Specht* v. *Patterson*, 386 U.S. 605 (1967), represents a retreat from the *Williams* rule. *Gardner* turned on the principle that the imposition of capital punishment calls for higher standards (see 430 U.S. at 357-358 (plurality opinion) and *id.* at 362-363 (White, J., concurring)). Moreover, the flaw in the sentencing procedure in *Gardner* was not that uncorroborated hearsay information was considered, but that—unlike here—the hearsay information was treated as confidential and not disclosed to the defendant or his counsel. *Id.* at 358-362, 363. *Specht* held simply that the invocation, for sentencing purposes, of a statute more severe than the one under which the defendant was charged (a procedure authorized by state law) entails the making of a new charge and requires, under the Due Process Clause, that the defendant be afforded a full-fledged hearing. That holding is clearly inapposite to this case.

4. The jury sent notes indicating that it had reached a verdict on four defendants (presumably the four who were acquitted) but was sharply divided on the remaining two, and it requested legal definitions of key terms in the charge. Thereafter it sent a second and third note, asking if it was necessary, in order to reach a guilty verdict on the substantive count, to find the defendant guilty of all acts charged in the count, "or can they be separated?" (Pet. App. 8a). The court responded that "[t]hey can be separated" but it declined a defense request that the jurors be instructed that they must be unanimous as to each act they found to be proven (*id.* at 9a). Thirty minutes later, the jury sent another note asking the same question in another form. The court's response was to reread the portions of its original charge concerning

the statute, the elements of the substantive offense, and aiding and abetting (Pet. App. 9a).

Ladmer contends (Pet. 4-8) that, in view of the jury's obvious confusion, the court's refusal to reinstruct on the requirement of unanimity left open the possibility that the jury's verdict did not reflect unanimity on any single specific act. As the court of appeals correctly held, however, in an analysis upon which we rely (Pet. App. 10a-11a), the jurors' inquiries reflect no uncertainty concerning the unanimity requirement. Their only uncertainty was whether they had to reach a unanimous verdict that the defendants had committed all of the acts specified in the count or could convict if they agreed as to only some of the acts. Reinstruction on the general unanimity requirement was therefore unnecessary.[18]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

MARSHALL TAMOR GOLDING
Attorney

JANUARY 1982

---

[18] Ladmer also presents a question whether his right to a fair trial was violated by the admission of testimony suggesting that he was connected to organized crime (Ladmer Pet. i); but since he does not argue the question or even specify the testimony concerned, the matter does not require a response.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 364095 767